No. 17-965

In the Supreme Court of the United States

DONALD J. TRUMP, ET AL.,

Petitioners,

v.

STATE OF HAWAII, ET AL.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* KHIZR KHAN IN SUPPORT OF RESPONDENTS

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INTRODUCTION

On October 3, 1965, President Lyndon B. Johnson signed the bill that abolished discrimination from our immigration laws.[1] Commemorating the occasion on Liberty Island, at the foot of the statue that welcomes huddled masses yearning to breathe free, President Johnson also spoke of American soldiers huddled in the jungles of Vietnam, breathing their last:

> Men there are dying—men named Fernandez and Zajac and Zelinko and Mariano and McCormick. Neither the enemy who killed them nor the people whose independence they have fought to save ever asked them where they or their parents came from. They were all Americans. It was for free men and for America that they gave their all, they gave their lives and selves. By eliminating that same question as a test for immigration the Congress proves ourselves worthy of those men and worthy of our own traditions as a Nation.

Remarks at the Signing of the Immigration Bill, 2 Pub. Papers 1037, 1039 (Oct. 3, 1965).

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[1] No part of this brief was authored or funded by anyone other than *amicus curiae* Khizr Khan and his counsel. Mr. Khan has respondents' written consent to file this brief, and petitioners have filed a blanket consent.

On June 8, 2004, at an Army base in Iraq, Captain Humayun Khan joined the hallowed company of those who have sacrificed everything for this country. Captain Khan died stopping a car full of explosives before it could reach hundreds of other American soldiers. He was one of thousands of Muslims who have served in the United States armed forces since the terrorist attacks of September 11, 2001. It is now the sacred duty of this Court to ensure that we remain worthy of those men and women, and worthy of our traditions as a Nation—including the Constitution itself, which Captain Khan gave his life to defend.

INTEREST OF *AMICUS CURIAE* KHIZR KHAN

Amicus curiae Khizr Khan is the father of Captain Humayun Khan, and has an interest in this case because the latest version of President Donald Trump's "Muslim Ban" not only desecrates Humayun Khan's service and sacrifice as a Muslim-American officer in the United States Army, but also violates Khizr Khan's own constitutional rights.

A. Out of the melting pot and into the fire

Mr. Khan is originally from Pakistan. He met his wife, Ghazala, at the University of Punjab, where she studied Persian and he studied law. After they married, they moved to the United Arab Emirates, where their son Humayun was born on September 9, 1976. In 1980, the Khans came to the United States, originally settling in Houston, Texas. Once they had saved enough money, Mr. Khan enrolled at Harvard

Law School, graduating with a master of laws (LL.M.) degree in 1986. The Khans moved to Silver Spring, Maryland, where Humayun and his two brothers grew up—all of them having become United States citizens.

Thomas Jefferson has long been one of Mr. Khan's heroes, and he liked to take the boys to the Jefferson Memorial and have them read the inscription under the dome: "I have sworn upon the altar of god eternal hostility against every form of tyranny over the mind of man." Years later, when Humayun applied to the University of Virginia, he invoked the spirit of Jefferson, writing that "liberty requires vigilance and sacrifice," and that those who are "beneficiaries of liberty must always bear this in mind, and keep it safe from attacks." Putting those ideals into practice, Humayun enrolled in the Army Reserve Officers' Training Corps (ROTC).

Humayun graduated in 2000 and was commissioned as an Army officer, eventually attaining the rank of Captain. After he was called to serve in Iraq, he reminded his father of his college application essay about defending liberty. "I meant it," Humayun said. He was stationed at Camp Warhorse near Baqubah, Iraq—about fifty miles northeast of Baghdad—leading the Force Protection Team of the 201st Support Battalion, First Infantry Division.

Captain Khan's unit was the most motivated and combat-oriented logistics unit his commanding officer had ever seen. *See* Dana J.H. Pittard, *I was Capt. Khan's commander in Iraq. The Khan family is*

our family, Wash. Post (Aug. 3, 2016), https://goo.gl/K49zGT. As a Muslim, Captain Khan was particularly able to foster warm relationships with local Iraqis. He started a program to hire locals to work on the base to improve relations between the soldiers and the town. And he was determined to break the cycle of violence by preventing unnecessary deaths and injuries at the gates, where several innocent Iraqi drivers had been wounded or killed because they failed to heed or did not understand the soldiers' instructions. The terrible irony is that Captain Khan's remarkable success in winning local Iraqi hearts and minds may have been what provoked the suicide bombing that took his life.

B. Captain Khan's sacrifice

On the morning of June 8, 2004, Captain Khan was supervising a checkpoint outside of Camp Warhorse. A taxi was approaching the gates. Captain Khan could have ordered his soldiers to put a .50 caliber shell through the windshield, but perhaps this driver, like others before, was just confused. Ordering his soldiers to hit the dirt, Captain Khan moved forward to stop the taxi before it could reach the gates or the mess hall beyond, where hundreds of soldiers were eating breakfast. Captain Khan was killed when the suicide bombers in the taxi detonated their explosives.

Captain Khan was posthumously awarded a Bronze Star and a Purple Heart. The Army named the 201st Battalion headquarters at Camp Warhorse the Khan Building in his honor. The University of

Virginia's ROTC center has a Khan Room dedicated to his memory. In July 2016, a regiment of ROTC cadets at Fort Knox honored Captain Khan at their graduation. The University of Virginia honored Captain Khan with a memorial plaque. But the soldier who dropped Captain Khan off at the gates that fateful morning honored him in the terms he might have appreciated most: "I read where someone called him a soldier's officer," Sergeant Crystal Selby said. "To me, he was a human's human." N.R. Kleinfield, Richard A. Oppel, Jr. & Melissa Eddy, *Moment in Convention Glare Shakes Up Khans' American Life*, N.Y. Times (Aug. 5, 2016), https://goo.gl/iT3wwK.

After Captain Khan's death, Mr. and Mrs. Khan moved to Charlottesville, Virginia, to be near their two remaining sons. The Khans also have become an integral part of the University of Virginia's Army ROTC program. Since 2005, the Khans and the ROTC have given the CPT Humayun S.M. Khan Memorial Award to the fourth year cadet who best exemplifies Captain Khan's qualities of courage, dedication, leadership, and selfless service. At the commissioning ceremonies, Mr. Khan gives the new officers pocket-sized copies of the Constitution. He reminds them to think hard about their oath to "defend the Constitution of the United States against all enemies, foreign and domestic." 10 U.S.C. § 502. No oath is more solemn, he tells them: "My son died for that document."

C. The Muslim Ban

On December 7, 2015, then-candidate Donald J. Trump called for a Muslim Ban. When asked how it would be enforced, Mr. Trump said that customs agents would ask, "Are you Muslim?," and ban people who answered "yes." Maya Rhodan, *Here's How Donald Trump Says His Muslim Ban Would Work*, Time (Dec. 8, 2015), https://goo.gl/H29BKx. President Trump still seeks to accomplish the same unconstitutional result, merely changing the question to, in effect, "Are you from one of these Muslim-majority countries?" But in 1965, Congress and President Johnson abolished such questions as unworthy of the sacrifices of soldiers like Captain Khan. *See Remarks at the Signing of the Immigration Bill*, 2 Pub. Papers 1037, 1039 (Oct. 3, 1965).[2]

Mr. Khan was asked to speak about his son's sacrifice at the Democratic National Convention on July 28, 2016. During that speech, Mr. Khan held up his copy of the Constitution—the pocket-sized kind he has been giving to newly commissioned Army officers and others for years—and asked if Mr. Trump had ever read it, offering to lend him one. Mr. Khan

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[2] Since 1965, Congress has repeatedly reaffirmed the non-discrimination principles President Johnson emphasized. For example, the Refugee Act of 1980 prohibits discrimination based on "race, religion, nationality, sex, or political opinion." 8 U.S.C. § 1522(a)(5). The "plight of the refugees themselves, as opposed to national origins or political considerations, should be paramount in determining which refugees are to be admitted to the United States." H.R. Rep. No. 96-608, at 13 (1979).

also urged Mr. Trump to go to Arlington National Cemetery, where Captain Khan is buried, to look at the graves of brave patriots, of all faiths, genders and ethnicities, who died defending the United States. Mr. Trump responded by disparaging the Khans and their plea to respect the Constitution and those who have died defending it.

After candidate Trump became President Trump, he lost no time in implementing his unconstitutional Muslim Ban. President Trump asked his advisors to find a way to do so "legally," but they failed, and the initial executive order was enjoined. Rather than defend his first executive order, President Trump issued a second executive order, which he described as a watered-down version of the first. This Court was set to hear oral arguments on the second executive order when it expired, and the Court dismissed that case as moot.

The day the second executive order expired, President Trump issued a proclamation entitled "Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats," Proc. 9645 (Sept. 24, 2017) (the "Proclamation"). That same day, President Trump stated: "The travel ban: The tougher, the better." J.A. 136. The Proclamation flows directly from the first two executive orders, and is yet another watered-down version of the Muslim Ban. The taint of discrimination has not been washed away.

Indeed, the underlying message of the Proclamation is the same as that of the original Muslim Ban. The message is that Muslims are unwelcome outsiders. And that message has been received loud and clear—not only by Muslims like Mr. Khan, but by those who have been denigrating and attacking Muslims with increasing frequency and vehemence since President Trump called for, and then began trying to implement, his unconstitutional Muslim Ban.

SUMMARY OF THE ARGUMENT

A. As President Johnson stated when he signed the Immigration and Nationality Act ("INA"), neither the enemies who killed soldiers like Captain Khan "nor the people whose independence they have fought to save ever asked them where they or their parents came from," and by "eliminating that same question as a test for immigration the Congress proves ourselves worthy of those men and worthy of our own traditions as a Nation." *Remarks at the Signing of the Immigration Bill*, 2 Pub. Papers 1037, 1039 (Oct. 3, 1965). President Johnson was right to give credit to *Congress*, *ibid.*, because the principle "that the formulation of these policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government." *Galvan v. Press*, 347 U.S. 522, 531 (1954). Even more deeply embedded is the first principle of our Constitution: "All legislative Powers herein granted shall be vested in a Congress of the United States which shall consist of a Senate and House of Representatives." U.S. Const. art. I, § 1. The Proclamation vio-

lates the separation of powers because it "does not direct that a congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588 (1952).

B. Moreover, not even Congress may make a law that sends a message to Muslims "that they are outsiders, not full members of the political community." *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309 (2000) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring)). Yet that is precisely what the Proclamation does. Thus, the Proclamation violates the Religion Clauses of the First Amendment. *See ibid.*; U.S. Const. amend. I.

For both of these reasons, *amicus curiae* Khizr Khan urges this Court to affirm the decisions below and strike down the unconstitutional Proclamation.

ARGUMENT

A. The Proclamation violates the separation of powers.

As discussed further below, the Proclamation violates the Religion Clauses of the First Amendment because it conveys a discriminatory message about Muslims. But this Court need not reach that issue because, even if the President issued the Proclamation with pure intentions, "to accomplish desirable objectives," the Proclamation violates the separation of powers. *See INS v. Chadha*, 462 U.S. 919, 951

(1983). This Court "has long recognized that under the Constitution 'congress cannot delegate legislative power to the president' and that this 'principle [is] universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution.'" *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1153 (10th Cir. 2016) (Gorsuch, J., concurring) (quoting *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892)). And, as the Court stated in *Kleindienst v. Mandel*, 408 U.S. 753 (1972), the formulation of immigration policy "is entrusted exclusively to Congress," whereas the President's role is "the enforcement of these policies," respecting "the procedural safeguards of due process." *Id.* at 767 (quoting *Galvan*, 347 U.S. at 531).

Contrary to petitioners' assertions, such "Executive action is always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded it is open to judicial review." *Chadha*, 462 U.S. at 953 n.16. Indeed, anyone who has "the privilege of litigating in our courts can seek to enforce separation-of-powers principles," even where, as here, the government seeks to justify its deviation from those principles based on concerns about terrorism. *Boumediene v. Bush*, 553 U.S. 723, 743 (2008). "The political branches, consistent with their independent obligations to interpret and uphold the Constitution, can engage in a genuine debate about how best to preserve constitutional values while protecting the Nation from terrorism," and this Court's "'insistence upon that consultation does not weaken our Nation's ability to deal with danger. To the contrary, that insistence strengthens the Nation's ability to

determine—through democratic means—how best to do so.'" *Id.* at 798 (quoting *Hamdan v. Rumsfeld*, 548 U.S. 557, 636 (2006) (Breyer, J., concurring)). As this Court held in *Youngstown*, the "Founders of this Nation entrusted the law making power to the Congress alone in both good and bad times." *Youngstown*, 343 U.S. at 589.

Yet the Proclamation "does not direct that a congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President." *Id.* at 588. Like a statute, the Proclamation "sets out reasons why the President believes certain policies should be adopted, proclaims these policies as rules of conduct to be followed, and again, like a statute, authorizes a government official to promulgate additional rules and regulations consistent with the policy proclaimed and needed to carry that policy into execution." *Ibid.* None of the authorities on which petitioners rely support their assertion of unilateral authority to promulgate new immigration policies at odds with those already established by Congress.

Petitioners rely heavily on *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950), but the Court there made clear that "[n]ormally Congress supplies the conditions of the privilege of entry into the United States," and that, even during war, any delegation of power to the executive is constrained by "congressional intent." *Id.* at 543. "Standards prescribed by Congress are to be read in the light of the conditions to which they are to be applied. They derive much meaningful content from the purpose of

the Act, its factual background and the statutory context in which they appear." *Ibid.* (quoting *Lichter v. United States*, 334 U.S. 742, 785 (1948)).

Petitioners argue that that the power to establish rules for excluding aliens is both legislative and executive in nature. *See* Pet. Br. 45-48. As Justice Thomas explained in *Department of Transportation v. Ass'n of American Railroads*, 135 S. Ct. 1225 (2015), however, the "Constitution does not vest the Federal Government with an undifferentiated 'governmental power,'" but instead identifies three distinct types of governmental power—legislative, executive, and judicial—which may only be exercised by "the vested recipient of that power." *Id.* at 1240-41 (Thomas, J., concurring); *see also, e.g.*, *Gutierrez-Brizuela*, 834 F.3d at 1153 (Gorsuch, J., concurring). "The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted," and, although the powers vested in each branch are not "hermetically" sealed from one another, they are "functionally identifiable." *Chadha*, 462 U.S. at 951. The functions of establishing immigration policy and law are clearly identifiable as *legislative* because the Constitution explicitly and exclusively grants those powers to *Congress*, along with the power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. Const. art. I, § 8, cl. 4 & 18.

Petitioners' interpretation of 8 U.S.C. §§ 1182(f) and 1185(a)(1) to grant the President boundless legislative authority deprives those statutes of "meaningful content." *Knauff*, 338 U.S. at 543 (quoting *Lichter*, 334 U.S. at 785). This Court rejected a similarly overbroad interpretation of Section 1185 in *Kent v. Dulles*, 357 U.S. 116 (1958). Section 1185(b) makes it unlawful for a citizen to depart from or enter the United States without a valid passport "except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe." *Id.* at 122 n.4. Those "broad terms"—which are the same as in Section 1185(a)(1)—do not grant the "pervasive power" to deny passports based on "beliefs or associations." *Id.* at 127-30. Even in the context of "foreign relations," a statute cannot "grant the Executive totally unrestricted freedom of choice." *Zemel v. Rusk*, 381 U.S. 1, 17 (1965). On the contrary, a seemingly broad grant of authority "must take its content from history," authorizing only those "refusals and restrictions 'which it could fairly be argued were adopted by Congress in light of prior administrative practice.'" *Id.* at 17-18 (quoting *Kent*, 357 U.S. at 128). Without such a limiting construction, the statute would be "an invalid delegation." *Id.* at 18.

Similarly, President Truman's Commission on the INA warned that Section 1182(f), in the absence of a limiting construction, would be impermissibly "vague." Commission on Immigration and Naturalization, Whom We Shall Welcome 178 (1953). Although "**latitude in administrative action is frequently a desirable objective . . . such discre-**

tionary authority should not be nebulous and undefined but rather should contain some standards controlling the administrative action." *Ibid.* (bold in original). From President Truman's time until now, executive orders under Section 1182(f) have "typically" applied to "individuals"; have sometimes been "based on affiliation" with specific organizations; and otherwise have suspended entry "based on objectionable conduct." 9 *Foreign Affairs Manual* § 302.14-3(B)(1) (2017).

Thus, petitioners' interpretation of Section 1182(f) as a grant of sweeping legislative authority is inconsistent with "prior administrative practice." *Kent*, 357 U.S. at 128. In any case, past practice "does not, by itself, create power." *Texas v. United States*, 809 F.3d 134, 184 (5th Cir. 2015), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016) (quoting *Medellin v. Texas*, 552 U.S. 491, 532 (2008)). "Congress has not thereby lost its exclusive constitutional authority to make laws necessary and proper to carry out the powers vested by the Constitution 'in the Government of the United States, or in any Department or Officer thereof.'" *Youngstown*, 343 U.S. at 588-89 (quoting U.S. Const. art. I, § 8, cl. 18).

Congress has given the President authority to address exigent circumstances, but has not given and cannot give him the legislative power to amend Congress's "specific criteria for determining terrorism-related inadmissibility." *Kerry v. Din*, 135 S. Ct. 2128, 2140 (2015) (Kennedy, J., concurring in the judgment). Nor may the President disregard Congress's command that "no person shall receive any

preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence." 8 U.S.C. § 1152(a)(1)(A). Sections 1182(f) and 1185(a)(1) may be "broad grants of authority," but they "cannot reasonably be construed as assigning decisions of [such] vast economic and political significance." *Texas*, 809 F.3d at 183 (internal quotation marks omitted).

Petitioners' contrary interpretation would make Sections 1182(f) and 1185(a)(1) the immigration equivalents of the line-item veto, which this Court ruled unconstitutional in *Clinton v. City of New York*, 524 U.S. 417 (1998). The Constitution denies the President the power to unilaterally suspend, amend, repeal, or enact statutes, in whole or in part, even if Congress purports to grant the President such power. *See id.* at 438-45. Such changes to the INA can be accomplished "in only one way; bicameral passage followed by presentment to the President." *Chadha*, 462 U.S. at 954-55. This may "seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked." *Id.* at 959.

More than fifty years ago, Congress rejected the argument that we should put "self-interest first" by refusing to admit "greater numbers of persons of different cultures and with different values who may come to add to our own very real and growing social upheavals," or engage in "subversion." *See* S. Rep. No. 89-748, at 3347-48 (1965). Such fearful prejudice

is "un-American in the highest sense," and unworthy of Captain Khan's sacrifice. *Remarks at the Signing of the Immigration Bill*, 2 Pub. Papers 1037, 1038 (Oct. 3, 1965). Our Nation has "flourished because it was fed from so many sources, because it was nourished by so many cultures and traditions and peoples." *Id.* at 1039. President Trump cannot overturn half a century of congressional policy—much less the Constitution itself—with the mere stroke of his pen.

B. The Proclamation violates the First Amendment's Religion Clauses.

The Proclamation also violates the First Amendment's Religion Clauses, which prohibit any "law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. The Establishment and Free Exercise Clauses are "inextricably connected." *Larson v. Valente*, 456 U.S. 228, 245 (1982). They must be "read together" in light of their joint purpose "to promote and assure the fullest possible scope of religious liberty and tolerance for all and to nurture the conditions which secure the best hope of attainment of that end." *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring); *accord Larson*, 456 U.S. at 246.

Determining whether the Religion Clauses have been violated "requires an equal protection mode of analysis." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540 (1993) (quoting *Walz v. Tax Comm'n of City of N.Y.*, 397 U.S. 664, 696 (1970)). Lawmakers "are required to accord to

their own religions the very same treatment given to small, new, or unpopular denominations." *Larson*, 456 U.S. at 245. When they fail to do so, the Court must "apply strict scrutiny." *Id.* at 246. The challenged law must advance "interests of the highest order," and be narrowly tailored to those interests; it "will survive strict scrutiny only in rare cases." *Lukumi*, 508 U.S. at 546 (citation omitted).

The protection of the Religion Clauses, moreover, "extends beyond facial discrimination" to forbid "subtle departures from neutrality and covert suppression of particular religious beliefs. Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality." *Id.* at 534 (citations and internal quotation marks omitted). Accordingly, courts look to "both direct and circumstantial evidence," including "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." *Id.* at 540. And because "the purpose apparent from government action can have an impact more significant than the result expressly decreed," the question is not what is expressly decreed, but what an "objective observer" would perceive. *McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 860-62 (2005) (quoting *Santa Fe*, 530 U.S. at 308).

Here, the evidence of discriminatory intent is overwhelming. That evidence is discussed in the

Fourth Circuit's opinion and elsewhere, and need not be addressed further here. Instead, Mr. Khan asks this Court to consider the Proclamation's message from the perspective of those on the receiving end of it. Petitioners ignore that perspective, contending that only "official pronouncements" matter. Pet. Br. 70. But this Court rejected that argument in *Santa Fe*, holding that school prayers violated the Establishment Clause—even though they were offered by students, rather than school officials—because a student "will unquestionably perceive the inevitable pregame prayer as stamped with her school's seal of approval." *Santa Fe*, 530 U.S. at 308. "Most striking" to this Court was the "evolution" of the school's policy from "the candidly titled 'Prayer at Football Games' regulation." *Id.* at 309. Although the word "prayer" was removed from the regulation, the "history indicates that the District intended to preserve the practice of prayer before football games." *Ibid.*

As in *Santa Fe*, the "evolution" from what candidate Trump candidly called a "Muslim Ban," to the watered-down versions of the first two executive orders, to the current Proclamation—which President Trump still candidly calls a "ban: the tougher, the better," J.A. 136—shows that, although the form of the Proclamation has changed, the underlying message has not. The message is that Muslims are outsiders, regardless of the depth of their devotion to the Constitution, and despite paying the ultimate price to defend it. That message is painfully clear to Mr. Khan, and also would be clear to the hypothetical objective observer, who is "presumed to be familiar with the history of the government's actions and

competent to learn what history has to show." *McCreary*, 545 U.S. at 866.

Contrary to petitioners' assertions, no psychoanalysis is necessary to perceive the Proclamation's discriminatory message. As Justice Stephen J. Field stated—riding circuit before anyone had even heard of psychoanalysis—"we cannot shut our eyes to matters of public notoriety and general cognizance. When we take our seats on the bench we are not struck with blindness, and forbidden to know as judges what we see as men." *Ho Ah Kow v. Nunan*, 12 F. Cas. 252, 255 (C.C.D. Cal. 1879). Likewise, this Court's "precedents sensibly forbid an observer 'to turn a blind eye to the context in which [the] policy arose.'" *McCreary*, 545 U.S. at 866 (quoting *Santa Fe*, 530 U.S. at 315). An observer familiar with the Proclamation's origins in President Trump's proposed Muslim Ban would perceive all too clearly the message that Muslims "are outsiders, not full members of the political community." *Santa Fe*, 530 U.S. at 309 (quoting *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring)). Thus, the Proclamation violates the Religion Clauses of the First Amendment.

CONCLUSION

Accordingly, Mr. Khan respectfully urges this Court to affirm the decisions below and strike down the unconstitutional Proclamation.

Respectfully submitted,

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